United Overseas Bank (M) Bhd v Hanya Satu Tours & Travel Sdn Bhd

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24FC-1139–06 OF 2015
MOHD NAZLAN JC
11 FEBRUARY 2016

Land Law — Charge — Order for sale — Defendant default in payment of two loan facilities granted by plaintiff — Each of loan facilities secured by charges over two pieces of land owned by defendant — Plaintiff applied for order for sale of said land — Whether both charges covered first facility — Whether statutory Notice 16D valid — Whether requirements under O 83 of the Rules of Court 2012 satisfied — Whether there was 'cause to the contrary' — Whether plaintiff entitled to foreclosure proceeding — National Land Code s 256 — Rules of Court 2012 O 83

This was an application by the plaintiff pursuant to s 256 of the National Land Code ('the NLC') and O 81 r 1 of the Rules of Court 2012 ('the ROC') for an order for sale of two pieces of land known as Lot 2215 ('the first property') and Lot 2216 ('the second property') located in Johor Bahru, both of which were registered under the name of the defendant. The first property and the second property were each charged by the defendant in favour of the plaintiff by virtue of two charges as security for loan facilities known as 'Fixed Loan 1' and 'Fixed Loan 2'. By a supplementary letter of offer dated 25 August 2009, the plaintiff had revised 'Fixed Loan 1' and cancelled the 'Fixed Loan 2'. Nevertheless, the supplementary letter of offer did not cancel the second charge. In consequence of default by the defendant, the plaintiff issued statutory Form 16D Notice in pursuance of cl 32 of the relevant charge documents, demanding payment of the amount due under the said charges. As the defendant failed to remedy the said breach within the stipulated time, the plaintiff filed the present action. The defendant submitted that since the plaintiff had cancelled 'Fixed Loan 2', the second charge over the first property and the second property was thus invalid and flawed. In addition, it was submitted that the plaintiff's demand under Form 16D was invalid as it wrongly demanded repayment of RM200,000 under 'Fixed Loan 2' which had never been disbursed to the defendant. On the contrary, the plaintiff submitted that it was inaccurate to state that since 'Fixed Loan 2' had been cancelled, the plaintiff did not have the right to enforce the second charge because both properties were charged for both 'Fixed Loan 1' and 'Fixed Loan 2'.

Held, allowing the application:

(1) The first charge and the second charge on both the properties, following the review, subsequently only secure 'Fixed Loan 1'. Therefore, the reference in Form 16D to the enforcement of both the first and second charges in respect of each of the first property and the second property of the defendant was not legally defective. The plaintiff was entitled to hold the second charge as there was still an outstanding sum under 'Fixed Loan 1' based on the open account as seen in the charge Form 16A. Since the defendant had failed to pay the full outstanding amount due under the 'Fixed Loan 1', it was therefore the right of the plaintiff as a chargee to commence foreclosure proceeding over both charged properties (see paras 27–28).

(2) There was only 'Fixed Loan 1' and there was no basis for any contention that the defendant was in any manner misled or prejudiced by the Form 16D in respect of the first and second charges nor was there any legal necessity to issue separate Form 16D for different charges. Thus the statutory notice was valid and had been properly served on the defendant. There was no argument that the defendant had indeed received the same (see para 30).

(3) The requirements of O 83 of the ROC had been adhered to as: firstly, the originating summons and the affidavit in support having been served on the defendant not less than four clear days before the hearing date of the originating summons (O 83 r 1(2) of the ROC); secondly, the affidavit exhibited a copy each of the charges (O 83 r 3(2) of the ROC); thirdly, the affidavit showed the particulars of the amount due under the charges as at 29 October 2015 being the date fixed for the hearing of the originating summons; and fourthly, the affidavit had proven that the moneys secured by the charges was due and payable (see para 32).

(4) In the instant case, there was compliance with statutory requirements concerning the first charge and the second charge, the debt was not disputed, there was no prejudice suffered by the defendant nor was there unconscionable conduct proven on the part of the plaintiff and there was not any third party interest affected. There was therefore clearly no 'cause to the contrary' under s 256 of the NLC that can justify the aid of equity to the defendant or the withholding of relief to the plaintiff as the charge (see para 39).

[Bahasa Malaysia summary

Ini adalah permohonan oleh plaintif menurut s 256 Kanun Tanah Negara ('KTN') dan A 81 k 1 Kaedah-Kaedah Mahkamah 2012 ('KM') untuk perintah jualan dua bidang tanah dikenali sebagai Lot 2215 (hartanah pertama') dan Lot 2216 ('hartanah kedua') yang terletak di Johor Bahru, yang mana kedua-duanya telah didaftarkan di bawah nama defendan. Hartanah pertama dan hartanah kedua masing-masing digadaikan oleh defendan

menyebelahi plaintif menurut dua gadaian sebagai jaminan bagi kemudahan pinjaman dikenali sebagai 'Fixed Loan 1' dan 'Fixed Loan 2'. Melalui surat tawaran tambahan bertarikh 25 Ogos 2009, plaintif telah menyemak semula 'Fixed Loan 1' dan membatalkan 'Fixed Loan 2'. Namun begitu, surat tawaran tambahan itu tidak membatalkan gadaian kedua. Akibat kegagalan defendan, plaintif telah mengeluarkan notis statutori Borang 16D di bawah gadaian-gadaian tersebut. Oleh kerana defendan telah gagal meremedikan pelanggaran tersebut dalam masa yang ditetapkan, plaintif telah memfailkan tindakan ini. Defendan berhujah oleh kerana plaintif telah membatalkan 'Fixed Loan 2', gadaian kedua ke atas hartanah pertama dan hartanah kedua dengan itu tidak sah dan cacat. Tambahan pula, ia dihujahkan bahawa tuntutan plaintif di bawah Borang 16D adalah tidak sah kerana ia telah salah menuntut bayaran balik RM200,000 di bawah 'Fixed Loan 2' yang tidak pernah dibayar kepada defendan. Sebaliknya, plaintif berhujah bahawa ia adalah tidak tepat untuk menyatakan oleh kerana 'Fixed Loan 2' telah dibatalkan, plaintif tidak mempunyai hak untuk menguatkuasakan gadaian kedua kerana kedua-dua hartanah tersebut telah digadaikan untuk kedua-dua 'Fixed Loan 1' dan 'Fixed Loan 2'.

Diputuskan, membenarkan permohonan:

(1) Gadaian pertama dan gadaian kedua di atas kedua-dua hartanah tersebut, berikutan semakan semula itu, akhirnya hanya memperoleh 'Fixed Loan 1'. Oleh itu, rujukan dalam Borang 16D untuk penguatkuasaan kedua-dua gadaian pertama dan kedua berkenaan setiap hartanah pertama dan hartanah kedua defendan tidak cacat dari segi undang-undang. Plaintif berhak memegang gadaian kedua kerana masih terdapat jumlah baki di bawah 'Fixed Loan 1' berdasarkan akaun terbuka seperti yang dilihat dalam Borang 16A gadaian itu. Oleh kerana defendan gagal membayar jumlah baki yang kena dibayar di bawah 'Fixed Loan 1', ia dengan itu hak plaintif sebagai pemegang gadaian untuk memulakan prosiding halang terbus ke atas kedua-dua hartanah yang digadaikan (lihat perenggan 27–28).

(2) Hanya terdapat 'Fixed Loan 1' dan tidak ada asas untuk apa-apa hujah yang mana defendan dalam apa cara telah dikelirukan atau diprejudiskan oleh Borang 16D berhubung gadaian-gadaian pertama dan kedua malah tidak terdapat apa-apa keperluan sah untuk mengeluarkan Borang 16D yang berasingan untuk gadaian berbeza. Oleh itu notis statutori itu adalah sah dan telah disampaikan sewajarnya ke atas defendan. Tiada hujah yang defendan telah menerimanan yang sama (lihat perenggan 30).

(3) Keperluan A 83 KM telah dipatuhi kerana: pertama, saman pemula dan afidavit sokongan telah disampaikan ke atas defendan tidak kurang daripada empat hari lapang sebelum tarikh perbicaraan saman pemula itu (A 83 k 1(2) KM); kedua, afidavit mengekshibitkan salinan setiap

gadaian (A 83 k 3(2) KM); ketiga, afidavit menunjukkan butiran jumlah yang perlu dibayar di bawah gadaian-gadaian sehingga 29 Oktober 2015 iaitu tarikh yang ditetapkan untuk perbicaraan saman pemula; dan keempat, afidavit itu membuktikan bahawa wang yang dijamin oleh gadaian-gadaian tersebut adalah terhutang dan perlu dibayar (lihat perenggan 32).

(4) Dalam kes ini, terdapat pematuhan dengan keperluan statutori berkenaan gadaian pertama dan gadaian kedua, hutang itu tidak dipertikaikan, tiada prejudis yang dialami oleh defendan ataupun terdapat tingkah laku yang tidak berpatutan yang dibuktikan di pihak plaintif dan tiada kepentingan mana-mana pihak ketiga yang terjejas. Oleh itu jelas tiada 'cause to the contrary' di bawah s 256 KTN yang boleh menjustifikasikan bantuan ekuiti ke atas defendan atau menahan relief kepada plaintif sepertimana gadaian (lihat perenggan 39).]

Notes

For a case on order for sale, see 8(3) *Mallal's Digest* (5th Ed, 2015) para 3112

Cases referred to

Arab Malaysian Bank Bhd v Lian Yit Engineering Sdn Bhd [2000] 2 MLJ 51, HC (refd)

Kheng Soon Finance Bhd v MK Ratnam Holdings Sdn Bhd & Ors [1983] 2 MLJ 384, FC (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77; [1997] 1 AMR 1036, SC (folld)

Malayan Banking Bhd v Foo See Moi [1981] 2 MLJ 17, FC (refd)

Malaysia Building Society Bhd v Univein Sdn Bhd [2002] 7 MLJ 501, HC (refd)

Oh Kuang Liang v Associated Wood Ind Sdn Bhd [1995] 4 MLJ 390, HC (refd)

Phileo Bank (M) Bhd v Narendran Thambimutu [1999] 3 MLRH 485, HC (refd)

Syarikat Kewangan Melayu Raya v Malayan Banking Bhd [1986] 2 MLJ 253, PC (folld)

Vithal Kumar a/l Jayaraman v Azman bin Md Nor [2010] 2 MLJ 67; [2010] 3 CLJ 332, CA (folld)

Legislation referred to

National Land Code ss 256, 256(3), 340, 340(1), Forms 16A, 16D

Rules of Court 2012 O 83, O 83 rr 1, 1(2), 3(2), 3(3), 3(6)

Shanti Balanchandran (Lee & Tengku Azrina) for the plaintiff.

G Gunaseelan (G Gunaseelan & Assoc) for the defendant.

Mohd Nazlan JC:

APPLICATION

[1] This is an application by the plaintiff by way of an originating summons ('encl 1') pursuant to s 256 of the National Land Code ('the NLC') and O 83 r 1 of the Rules of Court 2012 for an order for sale of first, the property held under Geran 60117, Lot 2215 Bandar Johor Bahru, Daerah Johor Bahru, Johor ('the first property') and secondly, the adjoining property held under Geran 60118, Lot 2216 Bandar Johor Bahru, Daerah Johor Bahru, Johor ('the second property'), both of which were registered in the name of the defendant. The first property and the second property are each charged by the defendant in favour of the plaintiff by virtue of two charges, both of which were registered vide presentation Nos 69076/2008 dated 27 August 2008 ('the first charge') and 69077/2008, also dated 27 August 2008 ('the second charge').

[2] Following the hearing of the originating summons, I granted the order for sale of the first property and the second property on 19 November 2015. These are the reasons for my decision.

KEY BACKGROUND FACTS

[3] The plaintiff had via a letter of offer dated 2 April 2008 offered the defendant, two term loan facilities, specifically, Fixed Loan 1 for RM3,400,000 and Fixed Loan 2 for RM200,000 (collectively 'the facilities').

[4] The defendant is the owner of two adjoining renovated intermediate six storey office cum budget hotel situated on the first property and the second property.

[5] As a security for the facilities, a first party first charge was created over the first property and second property, and a first party second charge was also created on the first property and second property.

[6] At the defendant's request, the parties agreed that by a supplementary letter of offer dated 25 August 2009 the plaintiff had revised Fixed Loan 1 and cancelled the Fixed Loan 2. However the supplementary letter of offer did not cancel the second charge.

[7] Following a default by the defendant, the plaintiff on 8 May 2015 issued to the defendant the statutory Form 16D notice in pursuance of cl 32 of the relevant charge documents, demanding payment of the amount due under

the charges of RM2,732,898.36 as at 4 May 2015 together with interest at 3.5%pa above BLR calculated on monthly rest from 5 May 2015 until full settlement.

[8] The defendant failed to remedy the said breach within the stipulated time. Hence the plaintiff filed these proceedings.

SUBMISSIONS BY THE DEFENDANT

[9] The defendant contended that since the plaintiff had cancelled Fixed Loan 2, the second charge over the first property and the second property is thus invalid and flawed. The plaintiff's demand under the statutory Form 16D is similarly not valid as it wrongly demanded repayment of RM200,000 under Fixed Loan 2 which had never been disbursed to the defendant.

[10] The defendant had also previously agreed that the monthly repayment for the Fixed Loan 1 was RM22,900 for 46 months and subsequently RM26,444 for 156 months. The defendant further avers that the plaintiff has forced the defendant to offer to pay more than the agreed installment and asked them to put in writing which the defendant did. The plaintiff via a letter dated 13 July 2015 asked the defendant to pay RM60,000 monthly installment from August 2015–June 2016, RM65,000 from July 2016–June 2017 and RM70,000 from July 2017 until the loan is fully settled. The defendant contended that the monthly installment insisted by the plaintiff is unconscionable and contrary to equity and good conscience. The defendant alleged that by insisting to increase the monthly payments, the plaintiff has forced the defendant into default. The defendant relied on the case of *Phileo Bank (M) Bhd v Narendran Thambimutu* [1999] 3 MLRH 485, where the learned judge referred to a Federal Court case of *Kheng Soon Finance Bhd v MK Ratnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384 where it was held that on an application for sale of the land charged, the court has not only to apply the law but also to invoke the aid of equity in order to be satisfied whether a 'cause to the contrary' has been shown or not in accordance with s 256(3) of the NLC. The chargee must not only come to court with proof that the chargor has defaulted but also with evidence that the chargee himself was not guilty of any unreasonable conduct, and that there was no right of innocent third parties to be affected by the order.

REPLY BY THE PLAINTIFF

[11] The plaintiff argued that it is inaccurate to state that since Fixed Loan 2 had been cancelled, the plaintiff did not have the right to enforce the second charge because both properties, ie the first property and the second property were charged for both Fixed Loan 1 and Fixed Loan 2.

[12] The plaintiff reiterated that Fixed Loan 2 for RM200,000 had been cancelled only upon review via supplementary letter of offer on 25 August 2009 and nowhere in the supplementary letter of offer is it stated that the second charge over the properties was also cancelled.

[13] In addition, the Form 16A clearly stated that each of the first property and the second property was charged to secure the loan of RM3,400,000 which is the Fixed Loan 1.

[14] Further, the Form 16A of both the first charge and the second charge in cl (c) on the first page clearly stated the following:

> pembayaran kepada Pemegang Gadaian yang tersebut namanya di bawah ini berserta faedah, wang yang dari masa ke semasa dibayar kepada Pemegang Gadaian yang tersebut oleh kami dan daripada kira-kira terbuka dan kira-kira yang lain dan lain wang yang tersebut di dalam peruntukan yang dilampirkan.

[15] The plaintiff emphasised that the Form 16A charges evidence that the first property and the second property were charged to secure the amount owing by the chargor ('the defendant') to the chargee ('the plaintiff'), including the interest accruing from time to time, from an open account, other accounts and other monies. Therefore the defendant's contention that the second charge should not have been referred to in the 16D schedule is without any basis and contrary to what has been agreed between parties.

[16] The plaintiff further submitted that the Form 16D Notice is not defective as the plaintiff is only claiming for the amount under Fixed Loan 1. There is no need to issue separate 16D Notice for each of the first charge and the second charge as they involve only one loan. It is also noted that there is only one Form 16A document for both properties and not two.

[17] The defendant has in any event never challenged the amount owing under the charges.

[18] The plaintiff also referred to the defendant's letter dated 28 June 2015 which is an open admission of the debt and on the amount of monthly installments owing in the defendant's own letter of admission which states that the defendant 'bersedia menjelaskan hutang bulanan yang berjumlah RM160,000 dan cek-cek bulanan selama dua tahun seterusnya'.

[19] The plaintiff cited the Court of Appeal case of *Vithal Kumar a/l Jayaraman v Azman bin Md Nor* [2010] 2 MLJ 67; [2010] 3 CLJ 332 and argued that in the instant case, the defendant has failed to substantiate his claim to defeat the clear admission as contained in the said letter of 28 June 2015.

[20] The plaintiff submitted that the defendant had clearly defaulted in their monthly payment as agreed earlier in the supplementary letter of offer. The plaintiff had in no way caused the default.

[21] Further, given the contents of the said admission letter of 28 June 2015 the plaintiff submitted that the defendant had readily agreed to pay the amount of monthly instalment owing such that there could not be any unconscionable conduct or one contrary to equity.

THE APPLICABLE LAW

[22] Section 256 of the NLC reads as follows:

256 *Application to Court for order for sale*

(1) This section applies to land held under —

(a) Registry title;

(b) the form of qualified title corresponding to Registry title; or

(c) subsidiary title and to the whole of any undivided share in, or any lease of, any such land.

(2) Any application for an order for sale under this Chapter by a charge of any such land or lease shall be made to the court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.

(3) On any such application, the court shall order the sale of the land or lease to which the charge relates *unless it is satisfied of the existence of cause to the contrary*. (Emphasis added.)

[23] The leading case law authority on the application of this statutory provision, and specifically on the interpretation of the expression 'cause to the contrary' is the decision of the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77; [1997] 1 AMR 1036.

[24] This case, with the benefit of the Federal Court having performed an extensive review of various case law authorities, enunciated the following important principles of law which (I consider to be of relevance to this application) by the plaintiff and its opposition by the defendant. These are as follows:

(a) the court hearing an application under s 256 must bear in mind that the procedure under this statutory provision is meant to be speedy and summary in nature. The court is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the NLC. He must next ensure that the procedural requirements prescribed

by O 83 of the Rules of Court 2012 have been complied with. Subsequently, the court must deal with the very narrow question whether the material produced before the court by the chargor constitutes cause to the contrary. If the court is satisfied on a careful and an objective assessment of the factual material made available before the court that the chargor has shown cause to the contrary, the court will refuse an order for sale. On the other hand, if the court rules that the contentions by the chargor do not constitute cause to the contrary, the court will pronounce as such, with reasons, and grant the chargee's application;

(b) the concept of 'cause to the contrary' within s 256(3) may be established only in three categories of cases, namely by the chargor demonstrating that:

(i) his case falls within any of the exceptions to the indefeasibility doctrine embodied in s 340 of the NLC;

(ii) the chargee has failed to meet the conditions precedent for the making of an application for an order for sale, such as the failure to prove the making of a demand or service upon the chargor of a notice in Form 16D; and

(iii) the granting of the order for sale would be contrary to some rule of law or equity;

(c) in the absence of such strong and compelling reasons, a court would not be justified in withholding relief to a chargee under s 256 of the NLC. To act otherwise would be to ignore the mandatory language of s 256(3) read with s 340(1);

(d) unless a chargor can bring himself within one of the three categories of cases set out in para (b) above, no cause to the contrary would be shown and the court will be obliged to make an order for sale. It would not be sufficient to allege mere breaches by the chargee of the loan agreement between the chargee and the borrower or even of the terms of the annexure to the charge, in order to resist an application under s 256(3) of the NLC. While an allegation that the chargee acted in breach of contract may give rise to an independent action in personam, it is insufficient per se to defeat the ad rem rights of a charge under his registered charge to an order for sale;

(e) the court should not express any view on the merits of the points taken by the chargor, save to rule whether, having regard to the three narrow categories, a cause to the contrary has been established to the satisfaction of the court. Any allegation concerning breach of contract by the chargee, such as by not releasing moneys due under the loan agreement or by increasing the rate of interest without proper notice or by not

giving any proper account of the sums paid by the borrower does not constitute cause to the contrary. It does not, however, necessarily follow that the chargor who is unable to satisfy the court of cause to the contrary is left without any remedy whatsoever. Allegations that fail to amount to cause to the contrary may, nevertheless form the basis of an action in personam against the chargee;

(f) the court which makes an order for sale merely finds that the facts relied upon by the chargor to resist the chargee's application do not constitute cause to the contrary. The court is unconcerned with the issue whether the same facts are sufficient to support an action in personam that may be brought by the chargor against the chargee;

(g) an order for sale made pursuant to s 256 of the NLC is not a judgment. There is no judgment debt. The application by the chargee for the order for sale does not involve commencement of an action but is instead pursued in exercise of the right to enforce a statutory remedy against the chargor in default under the provisions of the NLC. It is premised not on a covenant but under the registered charge. The court hearing the application for foreclosure does not make any adjudication upon any substantive issue; and

(h) there are good policy reasons for adopting a narrow and restrictive interpretation of s 256(3) of the NLC, given the need to prevent institutional lenders from losing confidence in their right to realise their security through an order for sale.

[25] It is therefore incumbent upon this court to ensure the correct approach of judicially determining whether a grant of an order for sale under s 256 of the NLC is undertaken, by applying the requisite test and legal principles enunciated in *Low Lee Lian v Ban Hin Lee Bank Bhd* .

ANALYSIS AND FINDINGS BY THIS COURT

[26] The court is thus first concerned with whether the chargee, in this case, the plaintiff, has given the appropriate statutory notices as stipulated in the NLC.

[27] It is clear that both the first charge and the second charge which are registered in respect of both the first property and the second property of the defendant are originally intended to secure Fixed Loan 1 and Fixed Loan 2. This arrangement continued to be in force following the cancellation of Fixed Loan 2 as evidenced in the letter from the plaintiff dated 25 August 2009 which stated that all other terms and conditions of the facilities remain unchanged which was acknowledged and accepted by the defendant. This means that the first charge and the second charge on both the properties, following the review,

subsequently only secure Fixed Loan 1. Therefore, the reference in Form 16D to the enforcement of both the first and second charges in respect of each of the first property and the second property of the defendant is not legally defective.

[28] Furthermore, both the first and second charges in the respective Form 16A expressly specify that the charges are to secure payment to the charge 'berserta faedah, wang yang dari masa kesemasa dibayar kepada pemegang gadaian ... daripada kira-kira terbuka dan kira-kira yang lain ...'. I am of the view that the plaintiff is very much entitled to hold the second charge as there is still an outstanding sum under Fixed Loan 1 based on the open account ('kiraan terbuka') as seen in the charge Form 16A. It cannot be validly said that the defendant was confused let alone prejudiced since defendant at all material times was aware that the second charge was not cancelled as it was based on 'kiraan terbuka'. Thus, the argument advanced by the defendant is merely a convenient afterthought and defendant ought to be estopped from raising this at this juncture. Further, the defendant knew that the Fixed Loan 1 is still legally binding on them. Since the defendant has failed to pay the full outstanding amount due under the Fixed Loan 1, it is therefore the right of the plaintiff as a chargee to commence foreclosure proceeding over both charged properties.

[29] In the case submitted by the plaintiff of *Syarikat Kewangan Melayu Raya v Malayan Banking Bhd* [1986] 2 MLJ 253, the Privy Council ruled that Form 16D which referred to the breach simply as a failure to repay the principal and interest secured by the charge was a sufficient and accurate specification of the global amount due on a single account secured by two charges. Like in the instant case before me, in that case the aggregate amount due was not apportioned between the two charges, even though the second charge was to secure an additional facility on the same single account. Lord Oliver, delivering the opinion of the Privy Council said as follows:

> Mr Stewart, who has said everything that could be said in support of the appeal, was compelled to concede that a notice, particularly one following a letter of demand such as the one written by the Bank's solicitors on October 9, 1980, which referred to the breach simply as a failure to repay the principal and interest secured by the charge, would be a sufficient specification. That is exactly what, effectively, the notice did and the perfectly accurate specification of the global amount due on the single account secured by both charges cannot, in their Lordships' opinion, possibly have the effect of rendering insufficiently specific that which would have been sufficiently specific without any reference at all to the actual amount. The mortgagor knew perfectly well that it had one account and one account only with the Bank and, indeed, the second charge was raised specifically for the purpose of securing an additional facility on that very account. It is quite inconceivable that the mortgagor could have been in any way misled or prejudiced simply because the aggregate amount due was not apportioned between the two charges. There is not,

indeed, any hint or suggestion that it ever sought such an apportionment and the amount specified as due on both charges is conceded to be due in fact.

[30] In the instant case, there is only Fixed Loan 1 and there is no basis for any contention that the defendant is in any manner misled or prejudiced by the Form 16D in respect of the first and second charges. On the authority of the same case of *Syarikat Kewangan Melayu Raya v Malayan Banking Bhd* nor is there any legal necessity to issue separate Form 16D for different charges. Thus the statutory notice is valid and had been properly served on the defendant. There is no argument that the defendant had indeed received the same.

[31] The plaintiff must next demonstrate that the procedural requirements prescribed by O 83 of the Rules of Court 2012 have been complied with. I observe that the originating summons was filed on 26 June 2015, and the requisite affidavit in support was affirmed and filed by the plaintiff on 15 July 2015. The plaintiff's additional affidavit on the particulars of the amount remaining due from the defendant under the charges at the hearing date of the originating summons on 29 October 2015, had been affirmed on 19 October 2015 and filed on the same date.

[32] Accordingly, the requirements of O 83 have also been adhered to. This included first, the originating summons and the affidavit in support having been served on the defendant not less than four clear days before the hearing date of the originating summons (O 83 r 1(2)); secondly, the affidavit exhibited a copy each of the charges (O 83 r 3(2)); thirdly, the affidavit showed the particulars of the amount due under the charges as at 29 October 2015 being the date fixed for the hearing of the originating summons; and fourthly, the affidavit has proven that the moneys secured by the charges was due and payable (O 83 r 3(6)). The case of *Malaysia Building Society Bhd v Univein Sdn Bhd* [2002] 7 MLJ 501 is authority for the proposition that once compliance is made with O 83 r 3(6) a bare denial is insufficient. At the hearing, counsel for defendant raised the issue that the figure on daily interest as stated in the latest and additional affidavit is different from the one stated in the earlier affidavit in support. As counsel for plaintiff rightly pointed out, however, none of the affidavits of the defendant actually disputed the entire amount outstanding and even if this argument by the defendant being a statement from the Bar were to be entertained, it should be noted that O 83 r 3(3) only requires a statement of what is the amount due from the defendant which has in the instant case clearly been stated in the affidavit in support and repeated in the additional affidavit. Both stated the starting point being the main loan amount (which must be for Fixed Loan 1) of RM3.4m.

[33] Further, even if this issue concerning daily interest is deemed as being in any way defective, the court may dispense with any omission of statutory particulars in the relevant affidavit under this rule, and in any event, the case of *Arab Malaysian Bank Bhd v Lian Yit Engineering Sdn Bhd* [2000] 2 MLJ 51 has held that a mere failure to provide details under this rule does not constitute a cause to the contrary within the meaning found in s 256 of the NLC. It is also to be noted that in the instant case, the daily interest amount is a relatively small one: in the earlier affidavit it was stated to be RM779.64 whilst in the additional affidavit it was expressed as RM691.27. Hence the daily interest is lower than stated earlier.

[34] Finally, the court must deal with the very narrow question whether the material produced before the court by the chargor constitutes cause to the contrary. As stated earlier, if the court is satisfied on a careful and an objective assessment of the factual material made available before the court that the chargor has shown cause to the contrary, the court will refuse an order for sale. On the other hand, if the court rules that the contentions by the chargor do not constitute cause to the contrary, the court will pronounce as such, with reasons, and grant the chargee's application.

[35] The case of *Low Lee Lian* stated clearly that the concept of 'cause to the contrary' within s 256(3) may be established only in three categories of cases, namely by the chargor demonstrating that:

(a) his case falls within any of the exceptions to the indefeasibility doctrine embodied in s 340 of the NLC;

(b) the chargee has failed to meet the conditions precedent for the making of an application for an order for sale, such as the failure to prove the making of a demand or service upon the chargor of a notice in Form 16D; and

(c) the granting of the order for sale would be contrary to some rule of law or equity.

[36] The contention of the defendant that the plaintiff forced the defendant to offer to pay more than the agreed installment is in my view untenable. This became an issue when the defendant started to default. The defendant referred to the plaintiff's letter of 13 July 2015 on a set of terms for proposed settlement in reply to the defendant's request for the continuation of the facility as per the defendant's letter of 28 June 2015. However, the letter from the defendant of 24 June 2015 is subsequent to the service of the Form 16D Notice on 8 May 2015 which the defendant had failed to remedy within the stipulated one month period. The terms contained in the letter of the plaintiff dated 13 July

2015 were for settlement purposes as a possible alternative to the plaintiff not pursuing the application for an order for sale which in any event the defendant did not agree to.

[37] Further, case law authorities have established that communication on negotiations made on 'without prejudice basis' is not admissible. In the case of *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17, Chang Min Tat FJ, for the Federal Court held as follows:

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.

As such the plaintiff's letter dated 13 July 2015 cannot be admitted (see also *Oh Kuang Liang v Associated Wood Ind Sdn Bhd* [1995] 4 MLJ 390).

[38] In any event, defendant had not adhered to the repayment proposal and the said terms are thus not enforceable and the plaintiff is accordingly fully entitled to proceed against the defendant. As such, I do not find any unconscionable conduct on the part of the plaintiff and it cannot be true that the plaintiff had forced the defendant into default since the defendant had defaulted much earlier, way before the Form 16D Notice, and definitely several months before the letter of the plaintiff dated 13 July 2015. Further, the defendant themselves even initially agreed to offer to pay a much higher sum of RM160,000 monthly for two years as per their letter of 28 June 2015 which is not similarly marked 'without prejudice'. Pursuant to the case of *Vithal Kumar* referred to earlier, the defendant has not been able to deny that this letter does not amount to an open admission of debt, what more when it was issued after the expiry of the Form 16D Notice.

[39] Reliance by the defendant on cases such as *Phileo Bank (M) Bhd v Narendran Thambimutu* and *Kheng Soon Finance* is of little assistance for those cases involve different factual matrix which justified the court to find the existence of 'cause to the contrary'. In the instant case, there is compliance with statutory requirements concerning the first charge and the second charge, the debt is not disputed, there is no prejudice suffered by the defendant nor is there unconscionable conduct proven on the part of the plaintiff and there is not any third party interest affected. There is therefore clearly no 'cause to the contrary' under s 256 of the NLC that can justify the aid of equity to the defendant or the withholding of relief to the plaintiff as the chargee.

CONCLUSION

[40] Having regard to case law authorities and applicable legal provisions, based on the affidavits and submissions made on behalf of parties as well as the cases cited by the defendant which I do not agree can be relied on to advance the defendant's case, I am of the view that the arguments made by the defendant, including on the validity of Form 16D Notice, the allegation of unreasonable conduct of the plaintiff or in respect of the daily interest, cannot be said to constitute any form of a 'cause to the contrary' under s 256 that could justify the court refusing the granting of a order for sale of the charged properties. In the absence of such strong and compelling reasons, this court would not be justified in withholding relief to a chargee under s 256 of the NLC. To act otherwise would be to ignore the mandatory language of s 256(3) read with s 340(1) of the NLC. Accordingly, in light of the foregoing reasons, I allow the application by the plaintiff and grant an order for sale in terms of encl 1.

Application allowed.

Reported by Dzulqarnain Ab Fatar